Disability Advice Note

For the Office of Independent Adjudicator

By Sue Ashtiany

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1. Following the publication of the Pathway Report *Recommendations for the development of the OIA Scheme*, I was requested by the Independent Adjudicator and Chief Executive of the OIA to review the experience of disabled students in relation to the OIA's functions and activities in order to advise on whether there should be any changes to policy and practice in relation to complaints from disabled students. The present review and report arises from Recommendation 16 of the Pathway Report in the context of the user experience of the OIA, namely that the OIA should *"build on the constructive engagement manifest in the current consultation process to review and develop its disability policy and practice."*

2. The Pathway report recorded differences between students who self-identified as disabled and other users in their experiences of the OIA. Proportionately, considerably more disabled students use the OIA Complaints Scheme than other students. Although 6% of the general student population sampled at the time was recorded as disabled, 23% of the complainants were disabled. (See Table 23). The Pathway Report does not analyse the reasons for this disproportionate use of the OIA Complaints Scheme. There are other differences. It would appear that students with disabilities felt less informed than other complainants about the reasons for their treatment by their universities. They were evidently more likely than others to have found out their university's position on their complaint only after going to the OIA (Report of OIA Student Survey 2009 Table 32 of Pathway Report). These two data sets would suggest that students with disabilities disproportionately have concerns about their university or college experience about which in addition they do not feel well informed by the time they come to use the Complaint Scheme of the OIA.

3. Disabled students were also less likely to have been satisfied with the OIA process and less likely to agree that the process was fair. They were more likely to be dissatisfied with the Formal Decision, whether because they felt that their complaint had not been properly understood or because they were unhappy with the clarity of the language used. In response to research questions, they more frequently

expressed a wish for mediation as an option for resolution of their complaints and also for face to face contact with OIA staff than other users of the OIA. These data focus on the interaction between the student and the OIA and in my review I attempted as far as I could to discover the reasons for these findings and to determine what the OIA could properly do in its policies and practices to mitigate these responses.

4. Information was also provided to the Pathway review by organisations supporting disabled students. The comments from these groups suggested a perception that OIA staff might not be properly conversant with the relevant legal concepts. Comments recorded from some of these groups suggested that the OIA staff should receive "more training" and "seek more views from specialist organisations." (Citation generally from Chapter 9 Pathway). However I also note that the OIA has undertaken a great deal of training for its staff including from some of the organisations who have written to express a need for such training. I was provided with a list of training courses and workshops run since 2004 and I thought that it compared well with such initiatives by other public bodies. There was a good mix of internal and external courses, workshops and conferences and I also found no evidence of a lack of understanding of the law in documents from or discussions with the OIA. Clearly an ongoing programme of training and development is important for the staff of the OIA to carry out their functions effectively, but I was not able to identify any evidence to support an implication that they do not properly understand the issues with which they have to deal.

5. The OIA is the body that administers the independent complaints scheme that was established by the Higher Education Act 2004. It is not a regulator and has no powers over universities. It does not pass judgement on the issues raised in terms of determining legal rights and obligations. This is true for all its adjudications and my comments relating to the experience of students with disabilities are of general application in this regard. In its decisions on complaints, the OIA is expected to follow rational and fair procedures and to give adequate reasons for its decisions and recommendations and its procedures and decisions are capable of scrutiny by way of judicial review with that object in mind (see *R (Siborurema) v OIA* [2007] EWCA Civ 1365). The OIA approaches complaints with two questions in mind: first whether the HEI has properly abided by its own procedures and secondly to determine whether it has acted reasonably.

6. The OIA's role and remit is determined by the 2004 Act as further elaborated in its Rules. In relation to disabled students it may review complaints which are presented as claims of unlawful discrimination, usually though not always by way of failure to make adjustments. However it does not pronounce on whether the university has in fact unlawfully discriminated against the complainant within the meaning of the Equality Act (formerly the Disability Discrimination Acts). The OIA is careful not to subvert the function of the courts, which are the proper fora for determining such claims of discrimination

7. The role of the OIA is to determine "the extent to which a qualifying complaint is justified" (Schedule 2, paragraph 5(1)(a) of the Act) and in deciding whether a complaint is justified the OIA *"may consider whether or not the HEI properly applied its regulations and followed its procedures, and whether or not a decision made by the HEI was reasonable in all the circumstances*" (see rule 7.3.). So the essence of the OIA's task is to review the regulations and procedures of the HEI and to determine the extent to which its practice fell short of them and, where it finds such default, to make recommendations to mitigate or remove the detriment thus caused. However this function also involves determination about substantive matters in the context of what is reasonable in all the circumstances and what compensatory action should be taken. So although the OIA does not pronounce on issues of law, its conclusions and recommendations cover much the same ground as remedies that could be ordered by a court and part of the intention is that the Complaints Scheme should be a substitute for legal action.

8. The distinction between making a finding of fact and law on the one hand, with legal consequences for the parties and applying an understanding of the law on the other in order to recommend a course of action is a fine one and not always easy to delineate in practice. In addition, the situation is unusual in that although neither the student nor the institution is legally bound by the conclusions and recommendations of the OIA, universities always implement the recommendations made and so conduct themselves as bound. In this context I think there is room for confusion and a mismatch of expectations for students with disabilities - and their advisers – as to the role and remit of the OIA.

9. A student who comes to the OIA seeking a declaration that s/he has been discriminated against will not get it. And may well be disappointed in his or her expectations. However the OIA may well adjudicate as to what is considered reasonable, this being a concept with clear overlap with the Equality Act 2010 and in particular the statutory duty to make reasonable adjustments. And such a conclusion by the designated complaint body could well carry weight in any subsequent court proceedings. This is illustrative of the finely balanced task of the OIA which will not adjudicate legal rights and liabilities but will make decisions that could well have a direct relevance to such rights and obligations.

10. In order to develop a robust understanding of the OIA practice and procedure I first reviewed the material it publishes on its website, then read cases in more detail, spoke with a number of the OIA staff and read further additional material including internal guidance on disability issues. The website is the OIA's window on the world and is likely to be the first point of access. In terms of accessibility and navigability it is already impressive (having achieved an A standard) and is expressly working towards greater accessibility: "*we are working towards AA standard to ensure our website is accessible in accordance with the World Wide Web Consortium (W3C) guidelines".* The site gives prominence to accessibility, being able easily to be viewed in a number of different formats and also 'browsedaloud' with free soft ware. In addition it prominently identifies options for further assistance if required.

11. I was also impressed with the content. There is clear and comprehensive guidance on the site for students considering whether to use the Complaints Scheme and also for students unions and universities. The wealth of material available was written in clear and easily understood language. In addition to setting out comprehensive guidance on the OIA Rules in full, the site makes clear in simple language what the OIA could and could not do, and gives practical tips to a potential complainant. There is also a section of FAQs and an interactive wizard for the individual to utilise to see if they are eligible to bring a claim.

12. In addition the site provides information for students and their advisers about best practice by way of guidance notes and there are details of seminars and meetings held for student advisers with relevant papers uploaded. There is specific guidance

directed towards student unions and HEIs and details of past decisions of the OIA are also available on the site. There are also further topic specific guidance papers dealing with issues such as eligibility and completion of procedures letters. Finally there is help with the Scheme Application Form on which a complaint must be made. In all, the site is easily navigable and provides comprehensive and open information about the issues a potential complainant might need to consider as well as how to launch and pursue a complaint.

13. There are two respects in which the site could be further developed. First, the OIA could make clearer the process that it will adopt in dealing with complaints. In particular, the fact that the OIA's procedure is largely a paper review in which the option of meetings or mediation is not generally available is not given prominence on the site. And to the extent that the OIA is currently considering initiatives that will result in some different options being made available, these too can be highlighted. Secondly the remit of the OIA and its approach to complaints could be more clearly stated. In particular the distinction between what the OIA does and what a court would address could be both better spelled out and given more prominence. The concept of adjudication has strong judicial connotations but the OIA is more like an ombudsman. The OIA's role is not to make judgements about whether or not the student had been discriminated against or even prior judgements as to whether or not the student meets the definition of a disabled person under the Equality Act 2010, but rather to determine whether the HEI has acted reasonably towards the complainant in the context of its own procedures and policies and to make appropriate recommendations for action that could reasonably ameliorate the cause of the complaint. This is a sophisticated and important distinction which is not always easy for the student to understand or for the OIA to articulate.

14. In addition to reviewing all the OIA's guidance and other general literature relevant to the issue that I have been asked to review, I also looked at details of all the disability cases and then reviewed a number of the more complex decisions in depth. Finally I read the cases of *R (Siborurema) v OIA*, [2007] EWCA Civ 1365, and *R(Maxwell) v OIA* [2009] 2778 which was a judicial review application decided in July 2010 dealing precisely with the ambit of the role of the OIA. I found no evidence to support the criticism of lack of understanding of the claim which is one of the key concerns evidently expressed by students with disabilities and their advisers. In each of the cases that I reviewed in detail the adjudicator displayed an appropriate knowledge of

disability issues and applied this appropriately to the case before him or her. The adjudications appeared to me to be careful and thoughtful and where the complaint was considered to be at least partly justified; there was often a range of recommendations. These recommendations were frequently expressly addressed to the need to obviate the disadvantage that would be associated with the disability and often also included a financial element which was not directly related to any actual financial loss. There is a fine line between this approach, which results both in recommended action by the university and financial recompense and the judicial function of determining legal rights and obligations and making awards.

15. Where a complaint was considered to be justified or partly justified, the Conclusions often included qualitative comments on disability issues. Some examples:

a. " the University failed to have proper regard to its responsibilities towards X as a disabled student… it did not make all the adjustments identified as reasonable"

b. "The Board's policy.. may disadvantage students with disabilities"

c. " the University may have failed properly to consider its obligations towards Y as a disabled student"

d. "The evidence presented supports a finding of harassment. The University's explanation did not address the matter adequately"

e. "The University did not have sufficient regard to its obligations under the DDA in particular to identify whether the examination format was of itself a competence standard"

f. " The University did not consider whether Z was in fact placed at a disadvantage by the yardstick assessment in its current format"

The recommendations often prescribed a compensatory course of action and sometime made specific reference to rights under the law. Some examples:

i) £3000 compensation, opportunity to re-start the course, and the parties to meet and agree adjustments to be made and the form the assessments will take.

ii) Noting that an apology and acknowledgement had already been offered, £2500 to be paid within one month "in recognition of the impact upon the student of the matters complained about"

iii) Opportunity to return to programme within one month, offer of accommodation + £2500 " in recognition of the failure properly to consider its obligations under the DDA"

iv) £3000 in compensation + an apology and also to " ensure that tutors are aware of the University's responsibility under disability legislation.

16. Even where the complaint was found not to be justified, the Adjudicator would make comments on the wider aspects of the case, if they seem justified. Thus in one case the complaint was not upheld but with the following suggestion that " the University.. **having due regard to its obligations under the disability legislation,**[my emphasis] considers any necessary avenues of recourse.." And in another case which was not considered justified, the Decision recorded " I have considerable sympathy for the difficulty [the student] has faced.. but [the student] did not identify [him/her] self as a student with a disability nor did the evidence presented to the University establish that fact conclusively." These Decisions clearly record an active engagement with and consideration of disability issues.

17. In some of the cases I reviewed, there was a lack of clarity between Conclusions and Recommendations and it would be helpful for the OIA to develop a more standard decision template so as to ensure that as far as possible the outcomes of all complaints follow a clear systematic approach recording the facts, the conclusions and the recommendations so that the parties can see clearly what has been determined and why a recommendation has been made. It is equally important for the OIA adjudication staff to explain why action is not recommended so that in each case the complainant and the HEI has a clear understanding of the outcome of the complaint. I do not underestimate the difficulty of this task.

18. Some of the cases I saw spanned several years and had generated voluminous paperwork much of it convoluted and unclear. In some cases the Adjudicator had been almost inundated by the length and number of representations and contact from the student. In other cases the HEI had been less than helpful in bringing forward coherent and clear information. There was no process whereby the Adjudicator could compel disclosure and nor could assertions be tested except by counter statements that sometimes only partially met the case. Given these difficult circumstances, the more rigorously the Decisions can be made to fit a good template,

the more robust they will be. This will be especially important if there is a pending court case about the same issues.

19. The OIA's remit and the possibility of a mismatch of expectations is a fundamental issue and was recently considered in the judicial review case of *Maxwell v OIA* [2010] EWCA 1889. In that case the student complained to the Administrative Court by way of judicial review proceedings that the OIA had failed to make a finding as to whether she was disabled or not and had thus failed to discharge its responsibilities. The student had initially filed a Statement with the OIA and had then also started proceedings in the county court. She and the University had agreed to an order for the county court proceedings to be stayed pending the Decision of the OIA. Following the issue of the draft decision from the OIA, both the student and the University wrote to the OIA noting that "discrimination" had formed part of the student's complaint and should be included in the scope of the OIA review. So evidently both parties wanted such a determination by OIA.

20. The OIA declined to make a "finding" as to whether or not the student had been unlawfully discriminated against by the University. It said that in *"considering the issues related to disability discrimination the OIA does not act as a court. It does not investigate in the same manner as a court, nor make findings which are based on the supposition as to what a court might have done in the same case."* It took the view that it was appropriate for the OIA to refer to the law and "*in considering guidance on disability discrimination to form an opinion as to good practice and to decide whether the University has acted fairly".* (See para 40 Judgment referring to draft decision) but that it was not required to make an adjudication as to whether there had been unlawful discrimination. As the judgment records, both the draft and final Decisions dealt at some length with the substance of the student's complaint about the University with a good deal of reference to the DDA and to disability discrimination, and to her complaint concerning such discrimination.

21. After a full review of the case and the authorities, the court upheld the OIA approach. It concluded that the OIA was not required to make findings of discrimination or otherwise. Having carefully reviewed the function of the OIA and the courses of action available to it, the judgment concluded that the OIA rightly has wide discretion, that there are many reasons why it should not make such a finding (not least that it is not a court) and that its decision not to make a finding in the case before it was

unassailable at law. This decision is in line with other cases involving similar issues such as *R. v. South Bank University ex. P. Coggeran* [2001] ELR 42.

22. The Court however acknowledged that there was nothing to prevent the OIA from "*expressing a view about the strength or otherwise of a disability discrimination allegation as part of its review process"* and went on "*at one end of the spectrum, the OIA could form the view that the claim for disability discrimination was so weak or flawed that the HEIs dismissive response to it was perfectly acceptable and reasonable in the circumstances. At the other end of the spectrum, the case may apparently be so strong that the HEIs response was plainly and entirely inadequate. Within that broad spectrum there may be many shades of opinion for the OIA legitimately to form. Provided that the OIA makes clear that any view it expresses on a matter like this is inevitably provisional and cannot be as authoritative as the decision of a court after hearing all the evidence, then in principle I cannot see any reason why such a view should not be expressed if it is thought appropriate. It could, of course, inform the nature and extent of any recommendation made."* (Paragraph 80) The claim was dismissed. At the time of this report the decision was on appeal but no judgment had been reached.

23. These conclusions of the Administrative Court support the OIA's approach, but it is inherently a nuanced position where the range of responses which the OIA may legitimately adopt is wide and, as with Ms Maxwell herself, may well not be reflective of the student's expectations or even those of the HEI. I think this may be the nub of the problem identified by the Pathway Report. If the user expects the service actually to determine issues of disability whether it be the student's status as a disabled person or the nature and extent of the reasonable adjustments required *by law*, then the OIA's failure to do so may be interpreted as a failure to understand the issues involved. Where there is a dispute between the student and the HEI about the former's status as a disabled person then it is likely that student will be aggrieved to find that the OIA has not adjudicated on that issue. Even if there is no dispute about the person's status as such, there may be some dispute about the nature and quality of medical evidence determining the extent of the student's impairment.

24. And there will almost always be a dispute about the nature and extent of the adjustments which it would be reasonable for the HEI to make. Whether formulated

as such or not, this will be a dispute about the HEI's underlying *legal* obligations. If the OIA then treads a careful course between determining whether the HEI has acted reasonably and not determining *legal* rights and obligations in relation to the statutory duty to make reasonable adjustments, any failure by the OIA fully to support the student's complaint may be translated into a perception that OIA has failed to understand the issues or else a complaint that the Formal Decisions are not written clearly. I have already suggested that the OIA could make more use of its website to clarify the extent of its role and approach. It could also consider whether more focused information could be provided to students unions, which are after all a standing body with the remit of working for the welfare of students in their institutions.

25. There is also evidence that by the time students with disabilities approach the OIA they already feel more aggrieved about the situation than other users. Evidently they have less information about the position of the HEI and its rationale and it is also of significance that a much higher proportion of them complain in the first place. There will be many reasons for this, potentially including the fact that costly legal rights are at issue; and an investigation of the causes is outside the scope of this review. However if this group of users comes to the OIA with significantly more concerns about their experiences to date than their counterparts, then any lack of clarity about the role and approach of the OIA will heighten the student's sense of dissatisfaction with the process.

26. The Pathway report also identified that students with disabilities were more likely to seek mediation and face-to-face meetings and to be less content with the paper approach of the OIA. The reasons for this were not expressed but it would not be surprising that people who feel aggrieved about a lack understanding on the part of the OIA (irrespective of the objective situation) also feel that they would do better if they could see someone face-to face. I have no evidence that an opportunity for the student to meet the adjudicator would objectively improve the decision-making process not least because on the papers I did not see evidence of incorrect decisions.

27. Making provision for meetings could help to satisfy a need for a better opportunity to communicate the student's concerns. And there also may be a very few cases where personal contact may be a reasonable adjustment to the normal process to

accommodate a disabled student. However I was struck by the intensity of the work load for OIA staff as well as the pressure of the case work and I would be cautious about extending this without clear evidence of objective benefit. And it seems to me that there would be inevitable pressure for the adjudicator also to meet a member of the university and thus potentially to risk the case consideration developing into a mini trial.

28. I am aware that OIA has recommended mediation in a number of cases and that this has been effective in resolving some complaints. Where the problem appears to be a breakdown in communication between the student and the university and the course of studies has not yet been completed, then OIA could consider making more such recommendations to facilitate resolution of the difficulties and enable the student to complete his/her studies as effectively as possible. There may well be greater scope generally for the OIA to take the lead in recommending or even arranging some form of assisted or facilitated communication between the student and the university. Indeed many recommendations will only succeed if there is better communication between the student and the university because they require the parties to reach agreement about important issues and to carry them out.

29. However I think the reference to mediation in the Pathway report is to mediation being offered by OIA itself and that does raise some issues. First OIA is an adjudication body with a reasonably clear remit, so for it to offer mediation would require careful thought in relation to its core adjudication function. Moreover, mediation has to be accepted by both parties and is usually binding in a way that the current adjudications are not, at least on the student. Mediations are also extremely resource intensive and their outcomes often depend on factors outside the mediation process. So I would be cautious about recommending recourse to mediation in the generality of cases. However there may be scope for OIA to offer a form of mediation that could potentially assist in resolution of some types of cases and may fit better with its adjudication remit.

30. This style of mediation is sometime called evaluative mediation. Evaluative mediation is different from more standard styles of mediation because it focuses on the legal rights of the parties rather than their wishes. The mediator's role is much more directional than in standard mediation as the mediator will usually try to reach

an evaluation based on legal rights and fairness and try to come to a workable resolution that meets these standards, having regard to how a case might be determined by a court. If OIA were to embark on such an initiative, there would probably need to be an amendment to the Rules and considerable work would be required to establish an appropriate framework, recruit trained people and establish clear mediation parameters. The current role of the OIA would also need to be reviewed as an evaluative mediation is essentially adjudication on legal rights and obligations, something that the OIA does not currently undertake. Both parties would have to agree to submit to the mediation and this would only be effective if both parties were prepared to compromise legal rights with due safeguards for the student.

31. I have found no evidence of any systemic problems in the work of the OIA. On the contrary I consider that in the cases I reviewed the rather difficult remit is well understood and well met. I was also impressed by the professionalism and dedication of the staff with whom I spoke. I have made some recommendations regarding the website and literature, the management of cases and possible introduction of a form of mediation for some cases. Clearly the evidence recorded in the Pathway Report requires and has received serious consideration but the objective reasons for the concerns are not clear. Going forward, OIA might wish to institute case reviews with some users of the service: students, student unions and universities in order to identify what is thought to work well and what did not and to build on that information.

I summarise my recommendations below:

a) Review of the website and literature to ensure that the scope of the OIA's remit is more clearly signposted giving consideration to providing specific information setting out what the OIA does not do especially in relation to adjudication of legal rights with more information targeted at students unions in this regard.
b) Further development of the website to achieve AA standard to ensure the website is accessible in accordance with the W3C guidelines

c) Review of the decision letters in order to develop a better standard approach for clearly distinguishing between conclusions and recommendations.
d) Development of initiatives such as assisted communications between students and HEIs, e.g. by way of facilitated meetings between the parties.
e) Piloting evaluative mediation with clear agreements and guidelines, where both parties are willing to participate and where rights can be effectively compromised.
f) Further development of internal guidance and policies to support adjudication staff.
g) Consideration be given to greater dialogue with users including institution of case reviews with some users of the service: students, student unions and universities in order to identify what is thought to work well and what did not and to build on that information.

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